

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

***THE OVERTON CORPORATION,
et al.,***

Plaintiffs

V.

CASE EQUIPMENT COMPANY, et al.,

Defendants

Civil No. 89-0164 P

RECOMMENDED DECISION ON MOTIONS TO DISMISS

The plaintiffs bring this action against several individual and corporate defendants alleging that they violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68,¹ and committed various state-law torts. The plaintiffs claim that the defendants used the United States mail and interstate wires to induce them to invest in a fraudulent business opportunity, to their financial loss. Two of the defendants, Showcase Homes, Inc. ("Showcase Homes") and Marion Casella, have moved to dismiss the First Amended Complaint ("complaint") as against them² for failure to aver fraud with particularity pursuant to Fed. R. Civ. P. 9(b) and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

I. MATERIAL ALLEGATIONS

¹ RICO provides a private right of action for treble damages to "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C.] section 1962" 18 U.S.C. § 1964(c).

² The plaintiffs seek relief from these defendants only in Counts I and II.

The material allegations of the complaint are as follows. The plaintiffs assert that they are victims of a fraudulent scheme through which the defendants induced them to purchase certain printing equipment and supplies. The defendants allegedly misrepresented the adequacy of the printing equipment sold pursuant to the scheme. First Amended Complaint & 1. Defendant Showcase Homes is alleged to be a Maine corporation affiliated with defendant Case Equipment, Inc. First Amended Complaint & 22. The complaint states that defendant Marion Casella is an individual residing in Androscoggin County, Maine. First Amended Complaint & 23. The plaintiffs allege that these defendants, among others, control and operate Case Equipment, Inc., the provider of the printing equipment and supplies. First Amended Complaint & 25. They also aver that the defendants participated in the promotion and sale of the printing equipment and supplies in interstate and foreign commerce as part of a racketeering enterprise. First Amended Complaint & 26. The alleged racketeering acts are wire fraud, First Amended Complaint & 28, and mail fraud, First Amended Complaint & 29. The plaintiffs assert that, upon information and belief, funds from the fraudulent schemes were diverted to the control and benefit of Showcase Homes, Marion Casella and other defendants in furtherance of a pattern of racketeering activity. First Amended Complaint & 35.

II. DISCUSSION

The moving defendants seek dismissal of the complaint against them under Fed. R. Civ. P. 12(b)(6). Because Count I of the complaint avers fraud against the defendants, Fed. R. Civ. P. 9(b) is also implicated. Therefore, as set forth below, I must first consider if Fed. R. Civ. P. 9(b) is satisfied

before deciding on a motion to dismiss Count I. The Count II RICO conspiracy claim implicates Rule 12(b)(6) only.³

A. Applicable Law

In ruling on a motion to dismiss, the court must take the material allegations of the complaint as true and construe the pleadings in the light most favorable to the plaintiffs. *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 25 (1st Cir. 1987); *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987). The motion will be granted ``only if, when viewed in this manner, the pleading shows no set of facts which could entitle the plaintiffs to relief." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988). The court, however, has ``no duty to `conjure up unpled allegations' in order to bolster the plaintiff[s] chances of surviving a 12(b)(6) motion to dismiss." *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 444 (1st Cir. 1990) (quoting *Gooley*, 851 F.2d at 514). Plaintiffs must ``set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gooley*, 851 F.2d at 515.

B. Count I - RICO

³ See *Gott v. Simpson*, 745 F. Supp. 765 (D. Me. 1990).

The plaintiffs allege in Count I a violation of 18 U.S.C. ' 1962(b) and (c).⁴ In order to state a RICO claim, a plaintiff must allege at least two predicate acts of racketeering activity. *See* 18 U.S.C. ' 1961(5). The plaintiffs in the instant case assert that at least two acts of racketeering activity underlie the RICO claim because they allege both mail and wire fraud. *See* 18 U.S.C. ' 1961(1). The two moving defendants argue that the plaintiffs have failed to satisfy the particularity requirement of Fed. R. Civ. P. 9(b) in pleading mail and wire fraud against them.

⁴ 18 U.S.C. ' ' 1962(b) and (c) state in relevant part:

- (b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
- (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity

Rule 9(b) mandates that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."⁵ Fed. R. Civ. P. 9(b). Malice, intent, knowledge and other conditions of mind may be averred generally. Rule 9(b) applies to civil RICO claims, including those based on mail and wire fraud.⁶ *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987); 18 U.S.C. 1961(1).

The rule, as interpreted by the Court of Appeals for the First Circuit, requires that plaintiffs asserting civil RICO claims based on mail and wire fraud "go beyond a showing of fraud and state the time, place and content of the alleged mail and wire communication perpetrating that fraud." *Becher*,

⁵ Rule 9(b)'s particularity requirement serves three purposes: "(1) to place the defendants on notice and enable them to prepare meaningful responses; (2) to preclude the use of a groundless fraud claim as a pretext to discovering a wrong or as a 'strike suit'; and (3) to safeguard defendants from frivolous charges which might damage their reputations." *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987).

⁶ A person may be prosecuted for mail fraud if he places in the mails anything that is a product of a scheme to defraud, and he uses the mails to execute the fraudulent scheme. 18 U.S.C. ' 1341. A wire fraud violation differs only in that it occurs when a person "transmits or causes to be transmitted by means of wire, radio, or television communication in interstate and foreign commerce any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme" 18 U.S.C. ' 1343.

829 F.2d at 291.⁷ Allegations based on "information and belief" do not satisfy Rule 9(b) unless the complaint also sets forth facts on which the belief is founded. *Id.* at 288 (citing *Wayne Investment, Inc. v. Gulf Oil Corp.*, 739 F.2d 11, 13-14 (1st Cir. 1984)). If a plaintiff fails to satisfy the "time, place and content" formulation delineated in *Becher*, the court must then determine whether to allow discovery. *Becher*, 829 F.2d at 291.

Applying the "time, place and content" formulation to the present case, I find that the plaintiffs have failed to satisfy Rule 9's particularity requirement as against defendants Showcase Homes and Marion Casella. While the complaint adequately addresses the "place" component, it lacks the requisite specificity regarding "content" and contains no information whatever as to the "time" the alleged fraudulent activity took place.

⁷The plaintiffs cite *United Fish Co. v. Barnes*, 627 F. Supp. 732 (D. Me. 1986), for the proposition that Rule 9(b) must be read in conjunction with Rule 8, which requires a pleading to be concise and direct. However, I find their argument unpersuasive in that the complaint in that case appears to have provided considerably more detail than does the plaintiffs' complaint here. In any event, the First Circuit has rejected the concept of strictly harmonizing the two rules. *See Becher*, 829 F.2d at 289-90.

The complaint states that Showcase Homes has a principal place of business in this judicial district, First Amended Complaint & 22, and that Marion Casella resides in Androscoggin County in Maine, First Amended Complaint & 23.⁸ It further states that, ``[f]or the purpose of executing and attempting to execute the aforesaid schemes to defraud, the Defendants . . . caused letters and other matters and things to be delivered by the United States Postal Service to and from this district and elsewhere . . . ," First Amended Complaint & 31, and ``caused to be made and made interstate telephone calls and other uses of interstate wire facilities . . . to and from this district and elsewhere . . . ," *id.* & 32. Taking as true the plaintiffs' allegations of each party's residence, I find that the complaint sufficiently details where the wires and mails were used.

⁸ The complaint sets forth the residence or principal place of business of each named plaintiff at && 5-15 and each defendant at && 16-24.

What the plaintiffs have failed to state, however, is the content of any wire or mail communications specifically involving Showcase Homes and Marion Casella.⁹ This contravenes one of the purposes of Rule 9's particularity requirement, which is to give defendant's sufficient notice of the allegations against them so that they can prepare a proper response. *See Becher*, 829 F.2d at 289. The general averments in §§ 31, 32 and 35 of the complaint give no indication of what these two defendants may have communicated to anyone. Given these circumstances and Rule 9's policy considerations, I find that the complaint does not meet the "content" requirement under *Becher*.

Finally, the complaint is devoid of any reference to time. The plaintiffs have not even offered a general time frame. They state at page 3 of their opposing memorandum that the approximate times of the wrongful acts can be found in the complaint at § 32. I find no reference to time in that or any other paragraph.

⁹ The complaint does set forth the content of the allegedly fraudulent promotional information received by each plaintiff in the form of wire transmissions, *see* First Amended Complaint § 28, and via the mails, *id.* § 29, but it does not specifically implicate these two defendants in those communications.

Because the plaintiffs have failed to meet Rule 9's particularity requirement, I must now consider whether discovery is appropriate in this case.¹⁰ The First Circuit has held that "`in a RICO mail and wire fraud case, in regards to the details of just when and where the mail or wires were used, we hold that dismissal should not be *automatic* once the lower court determines that Rule 9(b) was not satisfied." *Becher*, 829 F.2d at 290 (emphasis in original). The First Circuit further instructs that discovery may be allowed, for example, when the allegations of the complaint suggest a likelihood that the defendants used interstate mail or telecommunications facilities but the specific information needed is likely in the exclusive control of the defendants. *Id.* The court also noted that, "`[w]here there are multiple defendants . . . and where the plaintiff was not directly involved in the alleged transaction, the burden on the plaintiff to know exactly when the defendants called each other or corresponded with each other, and the contents thereof, is not realistic." *Becher*, 829 F.2d at 291.

Paragraph 35 of the complaint alleges that the enterprise diverted funds to defendants Showcase Homes and Marion Casella, among others, to their benefit and control. This suggests that these defendants were tangentially involved with the alleged scheme. While there are no facts to support these allegations, it is unlikely that the plaintiffs had access to the information from which to glean the needed facts. Such information would be peculiarly within the control of the defendants, making it difficult for these plaintiffs, like the plaintiffs in *Becher*, to know exactly when the defendants may have communicated with each other, what was said and who said it. Nonetheless, that is precisely what the plaintiffs must determine in order to sustain their claim of mail and wire fraud against these

¹⁰ The plaintiffs have requested that this court allow them to proceed with discovery with leave to amend the complaint should the court determine that, on the present record, the motions to dismiss should be granted for failure to satisfy Rule 9(b)'s particularity requirement. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Motions to Dismiss ("Plaintiffs' Memorandum") at 10.

defendants. Presented with a similar situation, the *Becher* court found that discovery was proper.¹¹ The court concluded that "[d]iscovery is warranted to a greater extent in mail and wire fraud." *Becher*, 829 F.2d at 291.

¹¹ The plaintiffs in *Becher*, after once being allowed discovery by the district court so that they could comply with Rule 9(b), requested further discovery. The district court denied their request and the plaintiffs appealed. The First Circuit reversed, finding that the plaintiffs' request was reasonable. *See Becher*, 829 F.2d at 292.

In the final analysis, the First Circuit instructs that courts balance Rule 9's purpose with `` the policy in favor of allowing amendments and trying cases on their merits, and against dismissals which would deny plaintiffs their day in court." *Id.* at 292 (citation omitted). In that light, I find discovery appropriate in this case. The plaintiffs have outlined the general scheme employed to defraud them. The complaint identifies each plaintiff and defendant involved in the allegedly fraudulent transactions as well as the substance of the fraudulent communications in as much detail as the plaintiffs appear to be in a position to know.¹² Discovery as to when the wires and mails were used and what was communicated by defendants Showcase Homes and Marion Casella will either produce the facts needed to bring this complaint into compliance with Rule 9 or make clear to the plaintiffs that their asserted claim does not lie.¹³

In sum, the defendants argue that, by failing to aver fraud with particularity as required by Rule 9(b), the plaintiffs do not have a sufficient RICO claim under ' ' 1962(b) and 1962(c). I agree.

¹² *Cf. Gott*, 745 F. Supp. at 770 (discovery inappropriate where victims of alleged frauds not named and description of fraudulent subject matter not identified.)

¹³ The plaintiffs suggest that the court take judicial notice of the record in a collateral Federal Trade Commission enforcement proceeding pending against the defendants, *see* Plaintiffs' Memorandum at 2, and of certain press reports made subsequent to the filing of the complaint, *see* Plaintiffs' Memorandum at 6-7. I presume that the information they refer to would be used to supplement the complaint regarding the involvement of Showcase Homes and Marion Casella in the alleged scheme. I decline this invitation, however, as it places an undue -- and inappropriate -- burden on the court.

However, in accordance with the law in this circuit, I find that the missing information is likely within the defendants' control and that discovery is an appropriate remedy.

C. Count II - RICO Conspiracy

Count II of the complaint alleges that the defendants conspired to violate the provisions of 18 U.S.C. ' ' 1962(b) and 1962(c) in violation of 18 U.S.C. ' 1962(d).¹⁴ Conspirators need not have accomplished the underlying, substantive RICO offense to be liable under a separate RICO conspiracy claim. *Gott*, 745 F. Supp. at 772 (citing *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981)).

The First Circuit has held, however, that ` ` a RICO conspiracy count must charge as a minimum that each defendant agreed to commit two or more specified predicate crimes in addition to charging an agreement to participate in the conduct of an ` enterprise's' affairs through a ` pattern of racketeering activity.'" *Winter*, 663 F.2d at 1136; *Gott*, 745 F. Supp. at 772.

¹⁴ 18 U.S.C. ' 1962(d) states:

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

I find that the plaintiffs have failed to assert a sufficient RICO conspiracy claim. This court in *Gott* determined that "[the] Plaintiffs' bare assertion that Defendants conspired to violate RICO is insufficient to state a claim for RICO conspiracy."¹⁵ Plaintiffs must also make factual allegations respecting the material elements of the offense, including the element of an agreement to violate RICO." *Gott*, 745 F. Supp. at 772. Nowhere in the complaint do the plaintiffs allege an "agreement" by Showcase Homes and Marion Casella to commit the predicate acts of mail and wire fraud or an agreement to participate in the conduct of the alleged enterprise through a pattern of racketeering activity. In the absence of such agreements, I find that Count II fails to state a claim of RICO conspiracy and, consequently, warrants dismissal under Rule 12(b)(6).

III. CONCLUSION

For the foregoing reasons, I recommend that the court allow discovery on the issue of the defendants' use of the wires and mails pursuant to their Count I claim, giving the plaintiffs sixty (60) days within which to amend their complaint to comply with Rule 9(b). I also recommend that the court **DISMISS** Count II against defendants Showcase Homes and Marion Casella for failure to allege a RICO conspiracy as to these defendants.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

¹⁵ See *Gott*, 745 F. Supp. at 772 n.4; compare with & 39 of First Amended Complaint.

Dated at Portland, Maine this 20th day of December, 1990.

David M. Cohen
United States Magistrate Judge